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No. 274

In the

Supreme Court of the United States

October Term, 1961

LEO CAFFERATA,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

RESPONSE TO PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF FACTS

The Grand Jury of Hamilton County, Ohio, instituted an investigation into the facts and circumstances surrounding the purchase, by the City of Cincinnati, of a particular building, to-wit: The Gibson Art Building, as a part of its "Off Street Parking Program." The purchase price, paid by the city, was one million two hundred and fifty thousand ($1,250,000.00) dollars, and was paid at the closing of the transaction in May, 1958.

Leo Cafferata, the Petitioner herein, was employed by the City of Cincinnati, as the Director of Off Street Park-

ing, and in such capacity, was responsible for the selection of various proposed parking sites, evaluating their feasibilities and coordinating the engineering studies made by independent firms engaged for that purpose. One of the buildings which fell entirely within the scope of his employment was The Gibson Art Building.

On the 27th day of April, 1960, Leo Cafferata was served with a subpoena duces tecum which called for his forthwith appearance before a duly convened Hamilton County Grand Jury, then in session, and to bring with him certain specified books, papers and records pertaining to the Gibson Art Building investigation. At the time of his being served with that subpoena, and before responding and appearing in front of the Grand Jury, Leo Cafferata consulted, in person, with an attorney and was advised by him to give them (the Grand Jury) whatever they want.

After Leo Cafferata arrived at the Court House, he first telephoned another attorney, spoke with him about his appearance before the Grand Jury, was sworn and gave testimony. Although he was cautioned and advised about his privileges, he at no time declined or refused to answer questions propounded to him, or claimed any constitutional privilege.

Upon concluding its investigation, the Grand Jury returned two indictments against Leo Cafferata charging him, in the first, with a violation of Section 2919.08, of the Revised Code of Ohio, which section has been known and is referred to as the "Conflict of Interest" section of the Code, and in the second, with a violation of Section 2917.25, of the Revised Code of Ohio, perjury. Subsequently, trial was had, in each case, separately and before juries, and Leo Cafferata was found to be guilty of both crimes.

Approximately one month prior to the first trial (on the "Conflict of Interest"), the trial court heard and over-

ruled a Motion to Quash and a Plea in Abatement. Two papers, labeled "Affidavits", were attached to, and filed with, the Motion and Plea. No evidence or testimony, however, was offered or introduced, by the Petitioner herein, in support thereof and, in fact, counsel for the Petitioner herein, who had signed his name as Notary to the signatures on the said "Affidavits", was called as a witness for the State of Ohio and testified that the statements contained in the "Affidavits" were not sworn statements. Accordingly, there was nothing offered by the Petitioner herein in support of his Motion and Plea. Said Motion and Plea was filed in both of the cases then pending against Leo Cafferata.

Following each trial and conviction, Motions for New Trials were filed, argued and overruled. The context of the Petitioner's argument, in each Motion for New Trial, was, subsequently included in his assignments of error on appeal to the Court of Appeals in the First District of Ohio and to the Supreme Court of Ohio. On each appeal, the reviewing Courts affirmed the convictions. Applications for rehearings by the Supreme Court of Ohio were denied. And, following the ruling on said denials for re-hearing, Leo Cafferata filed the Petition for Certiorari herein, seeking a review of the judgments of the Supreme Court of Ohio in each of the two cases.

QUESTION

Leo Cafferata, who is the Petitioner pro se herein, presents the following questions in his Petition:

1. Whether, in each or either of the proceedings against Leo Cafferata, there has been a violation of his State Constitutional guarantee against self-incrimination?

2. Whether, in each or either of the proceedings against Leo Cafferata, there has been a violation of his

fundamental right of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

The Petitioner, under Item III (Question Presented) in his brief, asks,

> "Can State officials, without making an arrest, hold a person in custody, away from the assistance of friend, family or counsel, and by use of threats and misrepresentation in the investigation of a criminal offense before a Grand Jury, compel that person to give testimony against himself, which is material to the inquiry upon which an indictment and ultimate conviction is based?"

The answer to both parts is "no". It is elementary to state that under our law, both in the United States and in the State of Ohio, no one can hold a person in custody without having made a lawful arrest, nor can anyone be compelled to testify against himself before a Grand Jury or elsewhere. No argument is here made with the Petitioner's setting forth (under his Item IV) the selected language from Section I of the Fourteenth Amendment to the Constitution of the United States, and from Article I, Section 10 of the Constitution of Ohio.

It is stated and suggested, by the Petitioner in his brief, that he was taken into custody by the Deputy Sheriff who served him with the subpoena to appear forthwith before the Grand Jury; that he protested and objected; that, despite his protests, he was grabbed by the arm and escorted to the Grand Jury room; that he complained to the Grand Jurors about having been forced to appear before them; that he attempted to leave the Grand Jury room and was ordered to be seated and testify, or be held in contempt;

and that, only after this coercion and the threats of punishment for contempt, he then proceeded to testify. This account, by the Petitioner, of the alleged facts and circumstances surrounding his appearance before the Grand Jury, as a witness, and the testimony he gave, is completely inaccurate, misstated and false.

It is true that, on April 27, 1960, at approximately 9:00 A.M., a "forthwith" subpoena was personally served upon Leo Cafferata at his place of employment. That subpoena directed that he appear before the Grand Jury forthwith, and that he bring with him certain records, papers and documents pertaining to the City's purchase of the Gibson Art Building.

Although the Petitioner has neglected to indicate, in his brief, that at the time of his being served with that subpoena, his attorney was present and they consulted with one another. It was at this time that his attorney advised Leo Cafferata to "—give them what they want. Don't hide anything. Give them what they want" (Case No. 77192, Record, page 184.) He was not placed under arrest, nor was he held in custody. Thereafter, he came to the Hamilton County Court House and to the Grand Jury room. He requested and was permitted to contact his attorney by telephone and a conversation between them was had.

He was not grabbed, dragged or forced into the Grand Jury room in any way. Nor was any such complaint or claim made at that time. In fact, the first time that the Petitioner suggested that he had been grabbed and led into the Grand Jury room, despite his protests, was when he filed the paper called "affidavit" which he attached to the Motion to Quash and the Plea in Abatement. That paper was not a sworn statement and the claim was not supported by evidence or testimony of any sort when the hearing was had.

The record (Case No. 77192, Record Page 259) discloses that, contrary to what the Petitioner has alleged to this Court, the following questions and answers were recorded by the Grand Jury after he was sworn to testify:

> "Q. Mr. Cafferata, we want to advise you of certain Constitutional privileges. You may testify if you so desire before the Grand Jury, or if you do not desire to testify in the Grand Jury on the basis it might incriminate you—
>
> A. Pardon?
>
> Q. If you do not desire, refuse to testify before this Grand Jury for the reason—
>
> A. I don't refuse to testify. I have nothing to hide."

Too, Mahlon B. Sheridan, Secretary of the Grand Jury, stated that the petitioner ". . . was given the opportunity not to testify if he so desired." (Case No. 77192, Record Page 259.)

A review of the testimony of William P. Staubitz, who was the foreman of that Grand Jury, and Mahlon B. Sheridan, who was the secretary (Case No. 77192, Record, Pages 23 and 365), will show that Leo Cafferata's allegations of having been compelled to testify against his will, pressured, threatened, and the like, were completely refuted and discounted. The juries in the trial courts, having before them both the claims of the Petitioner and the rebuttal, were in a position to weigh and judge the accuracy and truth of the matter; and they did by finding Leo Cafferata guilty as charged of the "Conflict of Interest" and guilty as charged of "Perjury".

It is respectfully represented to this Court that, although Leo Cafferata was fully entitled to the benefits and protection afforded by the Fifth Amendment to the Constitution of The United States, he at no time claimed the privilege although he was given the opportunity to do so.

The case of *Burk* v. *State*, 101 OS 220, Syllabus 2, sets for the law of Ohio as follows:

> "When a person is subpoenaed to appear before a grand jury then investigating an alleged crime and is examined as to his acts and conduct in relation thereto, and such person does not claim his privilege, he will be deemed to have testified voluntarily, and such examination does not constitute a violation of Section 10, Article 1 of Ohio Bill of Rights . . . In such case the State does not owe to such person the duty to first caution him and advise him of his constitutional privilege."

In the case at Bar, when Leo Cafferata appeared before the Grand Jury in response to the subpoena served upon him, he claimed no privilege and the Grand Jury nevertheless, cautioned and advised him. He, instead of claiming his privilege, proceeded to testify and made the announcement, "I don't refuse to testify. I have nothing to hide." The records of the Grand Jury, and of the trial courts, reveal that the testimony he then gave was actually presented by him, to the Grand Jury, over a period of several days. The investigation, and questioning of Leo Cafferata in connection therewith, was recessed from time-to-time, and from day-to-day, until it was completed. And, during those interruptions and recesses in Leo Cafferata's testimony, the Grand Jury continued with it's investigation by examining many other witnesses.

In testifying under oath before the Grand Jury, he lied in response to questions pertaining to the "Conflict of Interest", and the Grand Jury indicted him for the "Conflict of Interest" and also for "Perjury".

The Petitioner cites several cases, to-wit:

Palko v. *Connecticut*, 302 U.S. 319
Twining v. *New Jersey*, 211 U.S. 78
Lisenba v. *California*, 314 U.S. 219

which he sets forth as a guide in reviewing the action of the State insofar as the question of due process is concerned. He claims that the highest court of the State of Ohio has departed from the usual course of judicial proceedings, and has sanctioned that same departure by the lower courts of the State, so far that the fundamental standards of justice have been denied him. For that reason, the Petitioner insists that his claims and allegations, having been heard by all of the state courts, are now eligible to come within Federal jurisdiction; and that his Petition for a Writ of Certiorari to the Supreme Court of Ohio should be granted. It is respectfully submitted that the Petition should be denied.

On April 27, 1960, at the inception of the incidents from which these two cases stem, the first date on which Leo Cafferata appeared before the Grand Jury, he was not arrested, restrained or denied his right to counsel. Instead, he was summoned to appear as a witness, and to bring certain papers, records and documents, which he did. He at no time claimed his privilege against self-incrimination even though he was made fully aware of that right. The Grand Jury returned the indictments against the Petitioner on May 13, 1960. He was subsequently *then* arrested, and on May 20, 1960, he was arraigned.

Nor can it be claimed that the indictment, trial and conviction of the Petitioner, in the "Conflict of Interest" case (Case No. 77190) was based and dependent solely upon his appearance and testimony before the Grand Jury. If that were the case, it would have been necessary that he be called as a witness for the State during the trial (or to introduce his testimony given before the Grand Jury) in order to prove the necessary elements. That was not necessary at all. In fact, Leo Cafferata did not take the stand, in his own behalf, at that trial.

The Motion to Quash and Plea in Abatement were both

overruled because the trial court found that there was nothing offered in support of either; there was no substance to the claim there made.

During the trials, the juries heard all of the evidence, testimony and the arguments of counsel for both sides, including the claim here made of a violation of the Constitutional rights of the Petitioner, and returned their verdicts accordingly.

Thereafter, on appeal to the First District Court of Appeals, Hamilton County, Ohio and to the Supreme Court of Ohio, the Constitutional question was argued, and re-argued, and, in each instance, was denied by the rulings of those courts.

By his claim, here made, that all of the courts of Ohio have departed from the fundamental standards of justice (in his two cases), and that the Supreme Court of Ohio completely departed from the accepted and usual course of judicial proceedings by sanctioning the departure of the lower courts, it appeared that the Petitioner is really now claiming that "everyone is out of step but him".

Nothing appears in the records of the proceedings, prior to, during, or after the two trials to corroborate, substantiate, confirm or support the claim of the petitioner pro se that he was denied due process. The statements and allegations he now makes, as pertains to what occurred in the series of events leading up to, and culminating in his appearance and testimony before the Grand Jury, are not true or accurate. Those representations, if true, would form the foundation for his efforts now to be granted a Writ of Certiorari. Being false, as is clearly reflected in the records of proceedings in each case complained of, the foundation for his Petition has deteriorated and crumbled away, and his right to have such Writ of Certiorari collapses.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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